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No. 82-256

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer who has lawfully stopped a car to question the driver, and who reasonably suspects that the car might contain a weapon and that the driver might be dangerous, may conduct a limited search of the car for the weapon even if the driver is standing outside the car.

2. Whether a search of the unlocked trunk of a car about to be towed can be justified as a routine inventory.

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the power of a law enforcement officer to protect himself when he stops an automobile on reasonable suspicion. Various federal law enforcement authorities routinely make such stops for investigative purposes, and the resolution of this issue will determine the extent to which such officers may protect their safety by conducting a limited weapons search of the inside of the automobile. This case also presents a question concerning searches made for the purpose of taking an inventory of a vehicle that is, or is about to be, impounded by the authorities.

Federal law enforcement agencies have inventory practices that share some of the characteristics of the inventory search at issue in this case.

STATEMENT

1. Shortly after midnight on the morning of August 25, 1977, Deputies Howell and Lewis of the Barry County, Michigan, sheriff's department saw an automobile speed past them in the opposite direction; their radar showed the car to be going 71 miles per hour. Pet. App. 14, 36; H. Tr. 4.[1] The deputies turned around and pursued the car briefly. They then saw it swerve and come to rest with its front wheels in a shallow ditch beside the road. The back of the car was on the roadway. Pet. App. 14.

Respondent was the driver and only occupant of the car. When the deputies' vehicle parked behind his, respondent stepped from the car, leaving the driver's side door open, and met the deputies near the rear of his car. Deputy Howell asked respondent for his driver's license; respondent gave no answer. The deputy asked again, and respondent produced his license. Deputy Howell then asked respondent for his vehicle registration; again respondent made no response. When the deputy repeated his request, respondent, without saying anything, began walking toward the open door of his car. Pet. App. 14-15; H. Tr. 26. By this time, Deputy Howell had concluded that respondent "appeared to be under the influence of something" (Pet. App. 15; H. Tr. 20, 24).[2]

The deputies followed respondent back toward the car. As they approached the open door, Deputy Howell saw a large folding hunting knife with a four-inch blade lying closed on the floor in front of the driver's seat. Deputy

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[1] "H. Tr." refers to the transcript of the preliminary examination held on September 22, 1977. "Op. Tr." refers to the pretrial proceedings, held on April 28, 1978, which include the trial judge's oral opinion denying respondent's suppression motion.

[2] The deputy had previously noted that respondent drove erratically. H. Tr. 18.

Howell immediately told respondent to halt and to place his hands on the roof of the car; he then patted down respondent's clothing to see if he was carrying any weapons (Pet. App. 15 & n.1; H. Tr. 6). Deputy Lewis picked up the knife (Pet. App. 15; H. Tr. 48).

Deputy Howell then shone his flashlight into the front seat of respondent's car. Pet. App. 15. He explained that he was "looking * * * [t]o see if there was another weapon in the car" (H. Tr. 6-27; see Pet. App. 36). Deputy Howell saw, in the flashlight beam, a leather object protruding from under the fold-down armrest that separated the driver's side of the front seat from the passenger's side. Pet. App. 15; H. Tr. 22-23. Because Deputy Howell could not tell what this object was (H. Tr. 37), he knelt in the car and lifted the armrest. He then saw that the object was a leather pouch with a plastic bag protruding from it. Through the portion of the plastic bag that was protruding Deputy Howell saw a substance that he recognized as marijuana. Pet. App. 15, 37; H. Tr. 7, 37. Deputy Howell did not remove the pouch from the front seat until he had seen the marijuana in it. H. Tr. 30.

While these events occurred, respondent was standing near the rear of the car, two or three feet from the open door, with Deputy Lewis. Pet. App. 15; H. Tr. 27. Respondent was not handcuffed, and Deputy Lewis had not drawn his gun. H. Tr. 25, 28.[3]

2. When Deputy Howell saw the marijuana, he seized the pouch and placed respondent under arrest for possession of marijuana. He determined that respondent's car would have to be towed because respondent was under arrest, there was no other driver, and the car was partially blocking the road. After searching the inside of the car—a search that did not uncover the registration—Deputy Howell walked to the rear of respondent's car and noticed, for the first time, that the trunk lock had

[3] Deputy Howell testified that respondent "is probably a foot taller than" Deputy Lewis. H. Tr. 28.

been "punched out" (Pet. App. 15-16). He reached into the opening with a pocket knife and opened the trunk. Deputy Howell explained his reasons for doing so (H. Tr. 10-11):

> It was unusual circumstances to me. Also we check the vehicle to make sure there's nothing, you know, that's valuable.
>
> * * * * *
>
> I can't speak for the other officers, myself I check the vehicle to make sure there's nothing of value in there that can be later claimed—
>
> * * * * *
>
> [I opened the trunk n]umber one, because I already found [the] marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly I check them for valuables.

In the trunk Deputy Howell found two large paper bags that contained approximately 75 pounds of marijuana. Pet. App. 16.

3. The Barry County Circuit Court denied respondent's motion to suppress the marijuana. The judge explained his determination that the marijuana found on the front seat of the car was admissible as follows (Op. Tr. 5):

> I'm satisfied the officers were justified in searching the automobile for their protection. They observed this large knife and * * * they believed the defendant was under the influence of something from his actions. As I remember, he refused to say anything. * * *
>
> I'm satisfied that * * * the condition of the defendant, * * * his movement towards the automobile, and the view of the large knife, caused the officers to be apprehensive for their own safety, and therefore, they could make a search for weapons within the immediate surroundings of the defendant.
>
> I'm satisfied that this leather pouch could have contained a weapon * * *.

The judge also found that Deputy Howell opened the trunk because he was "concerned about valuables" (Op. Tr. 6). He upheld the search of the trunk as a lawful inventory search (*ibid.*).

A Circuit Court jury convicted respondent of possession of marijuana, in violation of Mich. Comp. Laws § 335.341(4)(d). He was sentenced to two years' probation, a $750 fine, and $300 in court costs. Pet. App. 35.

4. The Michigan Court of Appeals affirmed respondent's conviction. It held first that under *Terry* v. *Ohio*, 392 U.S. 1 (1968), "Deputy Howell's precautionary lifting of the frontseat armrest prior to allowing [respondent] to reenter his automobile was constitutionally valid as a protective search" (Pet. App. 39). The court found that Deputy Howell's inspection of the front seat was a "carefully circumscribed intrusion" and that there was "no evidence of a fullscale search of the automobile's interior" before respondent was arrested (*id.* at 40). The court noted that respondent had behaved erratically and was about to reenter the car when Deputy Howell saw the knife, and it ruled that the deputies were not "constitutionally required to allow [respondent] access to the driver's seat of his automobile without first taking the protective precaution of * * * ensur[ing] that no weapon was readily available there to [respondent's] grasp" (*ibid.*).

The Michigan Court of Appeals also held that Detective Howell's search of the trunk of respondents' car was a valid inventory search under *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (Pet. App. 42-44). The court of appeals stated that the decision to impound the vehicle was "clearly reasonable" in view of respondent's arrest and the car's location and vulnerability to theft (*id.* at 42). The court also found it immaterial that the search was conducted at the scene (*id.* at 42-43). The court noted the trial judge's finding that Deputy Howell's decision to search the car was prompted at least in part by his intention to take an inventory of valuables, and ruled

that Deputy Howell's reliance on an additional, "concurrent," and arguably valid basis for the search—that he could permissibly search for additional evidence once respondent had been arrested for possession of marijuana—did not undermine the inventory search rationale (*id.* at 43-44).

5. The Michigan Supreme Court, by a divided vote, reversed respondent's conviction. The majority did not question Deputy Howell's pat-down of respondent's person, but it held that *Terry* v. *Ohio*, *supra*, "authorized only a limited pat-down search of a *person* suspected of criminal activity. That case did not authorize the search of an area" (Pet. App. 18; emphasis in original; footnote omitted). The court added that "[a]ny weapon which might have been hidden in the car would have been out of the reach of [respondent] and thus not a danger to the deputies. Therefore, the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case" (*id.* at 18-19; footnote omitted). The court then held that the marijuana found in the trunk was the fruit of the search of the front seat because the state sought to justify the search of the trunk either as an inventory search or as a search incident to arrest, and, the court ruled, both justifications rested on the discovery of marijuana on the front seat (*id.* at 19-20).

Chief Justice Coleman dissented. She first rejected the majority's holding that *Terry* permitted only the search of a person, not the search of an area. She noted that in *Terry* itself the suspect wore an overcoat that the officer patted down, but that "a different result would not have been constitutionally required if the overcoat had been carried, folded over the forearm, rather than worn" (Pet. App. 23).

Chief Justice Coleman also disagreed with the majority's conclusion that the protective search of the front seat was unjustified because respondent was unable to reach any weapons in the car at the time. She noted that

had respondent not been arrested, he would have been allowed to reenter the car; in addition, she observed, respondent might have broken away and attempted to reenter the car while the deputies were still questioning him. In either event, respondent's "entry into the vehicle would have permitted him to gain possession of any readily accessible weapons in the vehicle" (Pet. App. 24).

Chief Justice Coleman also concluded that Deputy Howell's inspection of the front seat was not excessive in scope. She reasoned that the circumstances surrounding respondent's encounter with the deputies, including his erratic behavior and the knife on the floor of the car, gave them ample reason to shine a light into the car to see if other weapons were accessible. When Deputy Howell did so, he saw the leather pouch; and "[c]onsidering all the circumstances, including that one weapon had already been found and that the leather pouch was large enough to hold another, the officer could have reasonably concluded that safety required * * * [t]he lifting of the armrest" (Pet. App. 25). Moreover, she remarked, "[i]n contrast to the gravity of the dangers confronting the officers, the raising of the armrest was a minimal intrusion into [respondent's] legitimate expectation of privacy. The area underneath an armrest is not a * * * common repository for personal effects" (*id.* at 26). The marijuana, she noted, was in plain view once Deputy Howell lifted the armrest (*ibid.*). Chief Justice Coleman also concluded that the search of the trunk was lawful (*id.* at 27).

Justice Moody agreed with Chief Justice Coleman's analysis of the inspection of the front seat. He reasoned that the discovery of the knife justified the deputies' decision not only to ensure that respondent had no weapons on his person but "to conduct a brief search of the interior of the automobile for weapons, limited to areas in which a weapon could be concealed, yet accessible" (Pet. App. 28). The reason for the search, Justice Moody stated, was that "the officers might be endangered if [respondent] was permitted to re-enter the vehicle to gather

requested information or to drive away at a later point" (*ibid.*). Justice Moody further concluded that Deputy Howell's inspection of the front seat "was confined in scope reasonably designed to discover additional hidden instruments for potential assault upon the police officers" (*ibid.*).

Nevertheless, Justice Moody agreed with the majority that respondent's conviction should be reversed, concluding that the search of the trunk was illegal. He noted in particular that in this case, unlike *South Dakota* v. *Opperman*, *supra*, there was no standard inventory policy applied by the police department (Pet. App. 32).

SUMMARY OF ARGUMENT

I

Terry v. *Ohio*, 392 U.S. 1 (1968), held that a police officer who has lawfully stopped a suspect, and who believes that the suspect may be armed and dangerous, may protect himself by conducting a limited search of the suspect's person for weapons. Deputy Howell's limited inspection of the front seat of respondent's car was consistent with the principles of *Terry* and the reasonableness standard of the Fourth Amendment.

A. It is undisputed that Deputies Howell and Lewis had ample reason for the initial stop of respondent. Their subsequent observation of a large hunting knife in an easily accessible location, and of respondent's erratic behavior, gave them reason to believe that respondent might be armed and dangerous. The Michigan Supreme Court appeared to recognize as much, for it did not question the deputies' decision to frisk respondent's person. But the court held that Deputy Howell violated the Fourth Amendment when he inspected the front seat of respondent's car for weapons.

B. Deputy Howell's inspection of the front seat was limited in two important respects. First, he inspected areas—the front seat, and the area beneath the armrest only when he saw a suspicious object there—in which re-

spondent had, at most, a minimal expectation of privacy. Second, Deputy Howell's inspection extended only to areas where a weapon might have been placed—where, in fact, respondent would very likely have placed a weapon if he wished it to be accessible or if he had concealed it hastily when the officers approached.

The Michigan Supreme Court nonetheless invalidated Deputy Howell's inspection for two reasons. It first asserted that *Terry* applies only to searches of a suspect's person and does not permit an area near a suspect to be inspected for weapons. This assertion is plainly incorrect. The purpose of a limited *Terry* search is to enable an officer to protect himself from the risk of physical harm, and a suspect can endanger an officer by obtaining a weapon from a nearby area just as he can by using a weapon concealed on his person.

Second, the Michigan Supreme Court disapproved Deputy Howell's inspection of the front seat because, it asserted, respondent was "under control," and any weapon in the car was therefore out of his reach and not a danger to the deputies. This conclusion is probably incorrect as a matter of fact. But the Michigan Supreme Court's more fundamental errors lay in its attempt to reassess the danger faced by the deputies in the particular situation, and in its suggestion that they should have found some other way of protecting themselves, such as placing respondent under more complete control.

In our view, the correct approach is to apply a relatively simple and clear rule analogous to that established in *New York* v. *Belton*, 453 U.S. 454 (1981). *Belton* held that police officers may search a car incident to arrest even when the arrestees have been removed from the car. Similarly, officers should be allowed to conduct a limited *Terry* search for weapons in a car when they suspect that the person they have stopped might be armed and dangerous; courts should not speculate, after the fact, about the alternative measures the officer might have taken to prevent the suspect from gaining access to the car.

The reasoning that supported the adoption of such a rule in *Belton* applies at least as strongly in this case. First, when the police have reasonable suspicion, and therefore may stop a suspect, but do not have probable cause to arrest him, it is unclear to what extent they may use various methods of controlling him—such as handcuffing him, drawing a weapon, or placing him in a police vehicle. Officers making an investigatory stop may hesitate to take measures lawfully available to them because they do not want inadvertently to place a suspect under arrest. Moreover, an officer making an investigatory stop may be face-to-face with a suspect for an extended time —and therefore highly vulnerable to an assault—while he questions the suspect to determine whether to release him or arrest him.

Second, a limited weapons search of a car is far less of an intrusion than the search incident to arrest authorized by *Belton*.

Third, a brief inspection for weapons, unlike a search incident to arrest, is often the only practical alternative to substantially more intrusive action. An officer who reasonably believes himself endangered, but who cannot conduct a limited search for weapons, will have to restrict the personal mobility of the suspect in ways that most people would find far more intrusive than a limited inspection of a car. Moreover, if an officer has probable cause, the inability adequately to protect his safety during an investigative stop will prompt him to make a full arrest when he might otherwise simply have stopped a suspect for further investigation.

Finally, a stop, unlike an arrest, may culminate in a suspect's being allowed to return to his car; if he does, the suspect will have immediate access to any weapon in the car. Of course, if at the end of a stop the suspect, instead of being returned to his car, is arrested, *Belton* permits a full search of the car. Whatever the outcome of the investigative stop, it is therefore reasonable for the offi-

cers to take the relatively modest self-protective measures at issue here whenever they are confronting a potentially dangerous individual.

II

Although we believe the search of the trunk of respondent's car can be justified as a search incident to arrest, the State apparently defends it solely on the ground that it was undertaken in order to inventory the contents before impounding the car. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The majority of the Michigan Supreme Court did not consider either the inventory search or search incident to arrest justification, because it believed that both rested on Deputy Howell's discovery of marijuana on the front seat. If this Court rules that Deputy Howell's inspection of the front seat was lawful, it may wish to permit the Michigan Supreme Court to consider, in the first instance, the possible justifications for the search of the trunk.

If the Court does address the legality of the search of of the trunk, however, we offer certain observations. While Deputy Howell's search, unlike the search upheld in *Opperman*, was apparently not conducted pursuant to a regular departmental inventory procedure—thus significantly weakening the inventory search rationale—the other differences between this search and the search upheld in *Opperman* strengthen the inventory search justification here. First, the police in *Opperman* searched the locked passenger compartment of a car, including an unlocked glove compartment, while Deputy Howell searched an unlocked trunk—a place in which the owner of a car has less of an expectation of privacy, and which is far more accessible to thieves and more likely to give rise to claims against the police department. Second, Deputy Howell searched respondent's car on the scene, instead of waiting, as the police did in *Opperman*, until it was impounded; such a search on the scene is no more intrusive and is in fact likely to be far more effective in forestalling claims of theft.

ARGUMENT

I. A POLICE OFFICER WHO HAS LAWFULLY STOPPED A CAR AND REASONABLY SUSPECTS THAT THE OCCUPANT MIGHT BE ARMED AND DANGEROUS MAY CONDUCT A LIMITED INSPECTION OF THE CAR FOR WEAPONS EVEN IF THE SUSPECT IS NO LONGER SEATED IN IT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that when a police officer has lawfully stopped a suspect, the Constitution "permit[s] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. The Court explained that in such circumstances, it would be "clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. See also *Adams* v. *Williams*, 407 U.S. 143, 146 (1972). The principal issue in this case is whether Deputy Howell's inspection of the front seat of respondent's car is valid under the principles of *Terry*.

A. There is no question that Deputy Howell and Deputy Lewis had sufficient reason to stop respondent; he was speeding and he had driven off the road. Initially, the officers merely asked respondent routine questions; having received no indication that respondent was armed or dangerous, they did not search either him or his car. Cf. *Government of Canal Zone* v. *Bender*, 573 F.2d 1329 (5th Cir. 1978) (search of automobile for weapons held illegal when stop was made on suspicion of nonviolent crime and officers had seen no weapons).

But when respondent began to return to the car, the officers saw a large knife on the floor in front of the driver's seat. None of the courts below questioned the fact, testified to by the officers, that this knife was in plain view. The officers also had observed that respondent was acting erratically, as if he were under the influence of al-

cohol or a drug. These circumstances plainly could have led the deputies "reasonably to conclude in light of [their] experience * * * that the person[] with whom [they were] dealing may be armed and presently dangerous" (*Terry* v. *Ohio*, *supra*, 392 U.S. at 30). In *Pennsylvania* v. *Mimms*, 434 U.S. 106, 111-112 (1977), the Court held that a bulge under the clothing of a person stopped for a traffic violation creates a reasonable suspicion that the person is armed and dangerous and justifies a frisk of his person. The discovery of an actual weapon is an even clearer indication of dangerousness than a suspicious bulge. See also *State* v. *Luxem*, 324 N.W.2d 273 (S.D. 1982). It was surely reasonable for the deputies to conclude that a person who kept one knife readily accessible might also keep another knife or other weapon within easy reach, and respondent's behavior gave them ample reason to fear for their safety if respondent should gain possession of a deadly weapon.

The Michigan Supreme Court apparently acknowledged that the deputies had reason to fear for their safety, because it did not question that Deputy Howell was justified in frisking respondent's person for weapons. Pet. App. 18 n.6. But the court held that Deputy Howell was not justified in shining his light into the front seat, and then lifting the armrest when he saw a leather object capable of holding a weapon protruding from beneath it.

B. 1. Two aspects of Deputy Howell's search should be noted at the outset. First, that search constituted only a minimal invasion of respondent's privacy. It is by now well settled that an individual has a diminished expectation of privacy in the interior of an automobile. See, *e.g.*, *United States* v. *Ross*, No. 80-2209 (June 1, 1982); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Chambers* v. *Maroney*, 399 U.S. 42, 48-57 (1970). While a full-scale search of an automobile must ordinarily be supported by probable cause, this diminished privacy consideration is nevertheless relevant in determining the reasonableness of the relatively cursory "car frisk" under-

taken here. Deputy Howell did not rip open the seats of respondent's car (see *Carroll* v. *United States*, 267 U.S. 132 (1925)); he did not even open any container until he had ascertained that the transparent plastic bag held contraband (see *United States* v. *Ross*, *supra*). By shining his light on the front seat of the car, Deputy Howell saw nothing that a passer-by might not have seen in daylight or if respondent had stopped near a light at night. Deputy Howell did not lift the armrest until he saw a suspicious object underneath it, and in any event, as Chief Justice Coleman noted, the area beneath an armrest is not a place customarily used for private objects.

Terry emphasized that "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (392 U.S. at 19) and that "there is 'no ready test for determining reasonableness other than by balancing the need to search * * * against the invasion which the search * * * entails'" (*id.* at 21, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967)). As noted above, the Michigan Supreme Court apparently acknowledged that the deputies had a sufficient reasonable apprehension of danger to frisk respondent's person, an action that this Court has described as "a serious intrusion upon the sanctity of the person, which may inflict great indignity" (*Terry*, 392 U.S. at 17). If it was reasonable for the officers to frisk respondent's person, it is difficult to see how Deputy Howell's limited inspection of the car could have been unreasonable. While weapons in the car would have been less accessible to respondent than those on his person, at least until he was released, inspecting the interior of the car was a great deal less intrusive than frisking his person. Moreover, the knife that gave rise to the officers' apprehension was found in the car, suggesting that another weapon might be there as well.

Second, Deputy Howell's inspection of the front seat was "a limited intrusion designed to insure his safety"

(*Adams* v. *Williams*, *supra*, 407 U.S. at 148)—"limited to that which [was] necessary for the discovery of weapons which might be used to harm the officer" (*Terry*, 392 U.S. at 26). The front seat and the area around it were likely locations for any weapon respondent customarily carried in the car, or carried on his person and left in the car when he stepped from it to meet the officers. If respondent had wished to conceal a weapon hastily when the deputies approached, the lowered armrest provided a particularly convenient place. See *Brown* v. *State*, 358 So.2d 596 (Fla. Dist. Ct. App. 1978). And if respondent had reentered the car, any weapons on the front seat would have been immediately accessible to him. Deputy Howell's search therefore constituted no more than "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" (*Terry*, 392 U.S. at 29).

2. The Michigan Supreme Court gave two reasons for its conclusion that Deputy Howell's inspection of the front seat nonetheless violated the Fourth Amendment. First, the court asserted that *Terry* applies only to searches of the person and simply "did not authorize the search of an area" for weapons (Pet. App. 18)—even, apparently, if the area was accessible to the suspect and was a likely location for a dangerous weapon. In our view this premise is wholly untenable. The purpose of a limited *Terry* search is to enable an officer to protect himself from the risk of physical harm, and a suspect can endanger an officer by obtaining a weapon from a nearby area just as he can by using a weapon concealed on his person. See, *e.g.*, *United States* v. *Johnson*, 637 F.2d 532, 535 (8th Cir. 1980); *United States* v. *Rainone*, 586 F.2d 1132, 1134 (7th Cir. 1978), cert. denied, 440 U.S. 980 (1979) (footnotes omitted):

> [W]here the suspect is driving an automobile, a pat-down of the outer clothing may not be sufficient to assure the safety of the police officer. In those cases there is the real possibility that a weapon may have

> been secreted in a part of the automobile readily accessible to the suspect. This is particularly true where the suspect remains in the car, but is also true even where the suspect has been removed from the car. In the latter instance there is still a risk that the suspect may break away or that he may have a motive to kill the officer even after returning to his car.

Because the suspects in *Terry* were stopped while walking on a city street, *Terry* itself had no occasion to consider anything other than a search of a suspect's person for weapons. This Court's decisions dealing with searches incident to arrest have considered a wider variety of circumstances, however, and are a useful analogy. There is no question that a search incident to arrest may extend beyond the arrestee's person to a nearby area. See *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). And while a *Terry* search for weapons is more limited in scope because it cannot extend to objects or places that could not hold a weapon, the Court's explanation for allowing the area near an arrestee to be searched incident to arrest applies to *Terry* searches as well (*Chimel* v. *California*, *supra*, 395 U.S. at 762-763):

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. * * * And the area into which an arrestee might reach in order to grab a weapon * * * must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

The Michigan Supreme Court did not even attempt to explain why this reasoning should not apply to a *Terry* stop.

The second basis of the Michigan Supreme Court's disapproval of the limited search of the front seat was that because respondent was "standing near the rear of the vehicle under the control of Deputy Lewis * * *, [a]ny weapon which might have been hidden in the car would have been out of the reach of [respondent] and thus not a danger to the deputies" (Pet. App. 18-19; footnote omitted). As a factual matter, the Michigan Supreme Court's assessment of the situation appears to be incorrect; respondent was standing near the car, was not handcuffed or held at gunpoint, and apparently might have been able to overpower at least Deputy Lewis. In these circumstances a weapon in the car would certainly have been a danger to the deputies:

> It takes little imagination to realize that an armed suspect might hide his weapon in a car before getting out in response to a police order. Thereafter standing next to the car without handcuffs, [the suspect] * * * could have bolted to it, seized a weapon and fired before the officers could find cover.

United States v. *Wilkerson*, 598 F.2d 621, 625 (D.C. Cir. 1978). Had the respondent done so, the result could have been "at the least * * * a dangerous scuffle for access to the weapon" (*United States* v. *McClinnhan*, 660 F.2d 500, 504 (D.C. Cir. 1981)).

3. The Michigan Supreme Court's more fundamental error, however, was its attempt to reassess the degree of danger faced by the officers in the particular situation, and its implicit suggestion that the officers should have found some other way of protecting themselves, such as placing respondent under more complete control. This Court has repeatedly emphasized the dangers of "litigat-[ing] in each case the issue of whether or not there was present" sufficient basis for a police action. *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); see, *e.g.*, *United States* v. *Ross*, *supra*, slip op. 5; *New York* v. *Belton*, 453 U.S. 454, 458-459 (1981). It is difficult even

to reconstruct the precise circumstances that existed when Deputies Howell and Lewis stopped respondent, and more difficult to judge how a reasonable officer would have reacted at the time. See *Terry*, 392 U.S. at 13.

The deputies had to strike a balance among several important interests, not all of which could be fully protected—respondent's privacy interest in his car; his interest in being free from excessive restraints on his movement; and their own safety. The situation was fluid, hazardous, and multifaceted; to a great degree, the officers' reactions were necessarily instinctive. It is highly desirable to have a relatively simple and clear rule to govern such encounters, if a rule adequately reflecting constitutional values can be specified, instead of leaving the officers at large and placing courts in the position of second-guessing their judgments.

We have already suggested above that a *Terry* stop is analogous to an arrest for purposes of determining the allowable scope of an incidental protective search. In *New York* v. *Belton*, *supra*, the Court dealt with a search incident to arrest in circumstances closely resembling those present here, and adopted a bright line rule that allows police officers to search a car incident to arrest even when the arrestees have been removed from the car. In our view, an analogous rule should apply here: officers should be allowed to conduct a limited search for weapons in a car when they suspect that the person they have stopped on reasonable suspicion of criminal activity might be armed and dangerous, and courts should not speculate, after the fact, about the alternative measures the officer might have taken to prevent the suspect from gaining access to the car.

In *Belton*, a state trooper stopped a car on a highway for speeding. After the stop, he acquired probable cause to arrest the occupants for possession of marijuana. He ordered the occupants out of the car, placed them under arrest, and searched the car's interior while the suspects stood on the road, some distance away from both the car

and each other. See 453 U.S. at 455-456. In concluding that the trooper's actions constituted a lawful search incident to arrest, the Court deliberately did not rest its decision on the specific circumstances at the arrest scene —the number of officers and suspects, the means available to the officer to control the suspects, or whether any of the suspects would actually have been able to reenter the car. Instead, the Court emphasized that a "'single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.* at 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979).

The Court then adopted "the generalization that articles inside * * * the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460, quoting *Chimel* v. *California*, *supra*, 395 U.S. at 763 (brackets in original). The Court "defin[ed] * * * the limits of the area that may be searched in light of that generalization" and accordingly held that an officer may, "as a contemporaneous incident of [the] arrest [of the occupant of an automobile], search the passenger compartment of that automobile." 453 U.S. at 460.

This reasoning applies at least as strongly to a limited search of a car for weapons, conducted after the car has been stopped and the occupant has left the car but is not under arrest. First, for several reasons, the generalization on which *Belton* was based—that a suspect, even if outside a car, can gain access to a weapon inside the passenger compartment—is more likely to be true in the context of a stop. To begin with, the extent to which the police may "control" a suspect whom they have no probable cause to arrest is limited, and the limitations are unclear. For example, respondent's counsel suggested at the preliminary examination that Deputy Lewis might have held respondent at gunpoint to protect his safety (H. Tr.

27-28); but some courts have suggested that drawing a gun converts a stop into an arrest and may not lawfully be done in the absence of probable cause. See *United States* v. *Ceballos*, 654 F.2d 177, 182-184 & n.7 (2d Cir. 1981) (citing cases). In general, courts approach the question whether a particular display of force or restraint on the suspect has converted a stop into an arrest on the premise that "[e]ach situation is unique, involving the weighing and measuring of contrary indicators." *United States* v. *White*, 648 F.2d 29, 34 (D.C. Cir.), cert. denied, 454 U.S. 924 (1981). Compare *United States* v. *Strickler*, 490 F.2d 378 (9th Cir. 1974) (encircling suspect's car with police vehicles and drawing guns constitutes an arrest), and *United States* v. *Lampkin*, 464 F.2d 1093, 1095 (3d Cir. 1972) (drawing gun converts stop into arrest), with *United States* v. *Coades*, 549 F.2d 1303 (9th Cir. 1977) (drawing gun does not convert stop into arrest), and *United States* v. *White*, *supra*, 648 F.2d at 35 (same) (citing cases). See also 3 W. LaFave, *Search and Seizure* 31 (1978) (locking suspect in police vehicle "would [not] ordinarily be a permissible part of a stopping for investigation[; n]or can it be said that such action would *never* be permissible * * *. Similarly, handcuffing of the suspect is not ordinarily proper [citing *People* v. *Gabbard*, 78 Ill. 2d 88 (1979); *People* v. *Tebedo*, 81 Mich. App. 535, 265 N.W.2d 406 (1978)], but yet may be resorted to when necessary [citing *United States* v. *Purry*, 545 F.2d 217 (D.C. Cir. 1976)]").

Consequently, officers making an investigatory stop—unlike officers making an arrest—may be unable lawfully to take the measures customarily used to prevent a suspect from breaking away and reentering a car. Moreover, because the distinction between a stop and an arrest is unclear, officers may fail to take steps lawfully available to them to control a suspect because they do not want inadvertently to place him under arrest. In these respects, it is more important that an officer making a stop be able to inspect a nearby automobile that he reasonably

suspects might contain a concealed weapon than it is that an officer making an arrest be able to do so.

There are other ways in which officers who have stopped a suspect for questioning are in a more vulnerable position than officers who have effected an arrest. The purpose of a stop, unlike an arrest, is generally to allow the officer to "investigat[e] at close range" and determine whether criminal activity is afoot. See *Terry*, 392 U.S. at 24. For the duration of the stop, therefore, the officer will be in face-to-face contact with the suspect. In these circumstances an officer is highly vulnerable to any weapon the suspect is able to obtain. The officer may, in addition, require an appreciable amount of time to complete his inquiry and determine whether to arrest the suspect or to allow him to proceed; the suspect remains a threat to break away, and the officer remains vulnerable, throughout that period. "[P]ractical necessity requires that [the Court] allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself" (*Robbins* v. *California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring)).

In this connection, it is noteworthy that the courts of appeals have consistently recognized the hazards confronting officers who have made an investigative stop and have generally permitted a limited weapons search of a nearby place or container—even if the suspect could, in theory, be separated from the place or container, and even where a relatively substantial privacy interest was at stake. See, *e.g.*, *United States* v. *Romero*, No. 80-2181 (10th Cir. Nov. 4, 1982), slip op. 7; *United States* v. *McClinnhan*, *supra*, 660 F.2d at 504 (McGowan, J.) (search of briefcase during investigatory stop) ("[G]eneral discussions of personal privacy and public safety are not as useful * * * [as] focusing upon the options available to the investigating officer confronted with a reasonable apprehension of danger."); *United States* v. *Johnson*, *supra* (duffel bag on opposite side of store door from sus-

pect); *United States* v. *Wilkerson*, *supra*; *United States* v. *Rainone*, *supra*, 586 F.2d at 1135 ("[T]here [is] always the likelihood that the suspect will escape and return to the car."); *United States* v. *Powless*, 546 F.2d 792 (8th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Stevens*, 509 F.2d 683, 688 (8th Cir.), cert. denied, 421 U.S. 989 (1975) ("Hindsight * * * might convince one that the officers were being overly cautious or that they could have dealt with their concern by moving the suspects farther away from the vehicle, but we must view their conduct in terms of what could be considered reasonable under the circumstances then existing."); *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), cert. denied, 414 U.S. 820 (1973); *United States* v. *Green*, 465 F.2d 620 (D.C. Cir. 1972). See also *United States* v. *Kent*, No. 81-5776 (11th Cir. Nov. 22, 1982), slip op. 595-596.

A second reason for applying the rule of *Belton* in this context is that a limited search of a car for weapons is less of an intrusion into the suspect's privacy than a search incident to arrest. As we have said, a *Terry* search canot exceed the limits of its justification; it cannot include a search of places where a weapon could not reasonably be secreted. See, *e.g.*, *Adams* v. *Williams*, *supra*, 407 U.S. at 146; *Sibron* v. *New York*, 392 U.S. 40, 65 (1968). It is not clear, for example, whether the jacket pocket searched in *Belton* could have been searched in this case. Moreover, an officer may not conduct a *Terry* search of an area unless he has a reasonable apprehension that there might be a weapon in the area. A thoroughgoing search incident to arrest requires no such justification. To this extent, the Court can properly be less hesitant in permitting a limited weapons search on the basis of the generalization identified in *Belton* than it was in permitting a search incident to arrest.

Third, a brief inspection for weapons like that undertaken by Deputy Howell is—unlike a search incident to arrest—often the only practical alternative to substantially more intrusive action. Any means of controlling a suspect by placing restraints on his freedom of move-

ment—even if it does not amount to an arrest—can be offensive and humiliating. It is difficult to believe, for example, that many people would rather be handcuffed or locked into the back of a police vehicle while they were questioned, than allow the officers to take measures like those adopted by Deputy Howell.[4]

Moreover, restricting an officer's ability to ensure his safety during a stop will create pressure on the officer to make an arrest where he otherwise would not. Here, for example, we understand that under Michigan law the deputies could have effected a full custodial arrest of respondent for speeding, although that was not the normal procedure. Had the deputies known that they could not lawfully ensure their safety by looking in the car for weapons, they might well have decided to arrest respondent instead, so that they would be able both to place him under control and, in all likelihood, to conduct a full search of both the car and respondent's person incident to arrest. See *United States* v. *Robinson*, *supra*; *Adams* v. *Williams*, *supra*. Similarly, an officer may have probable cause when he first stops a suspect, but may wish to make inquiries in order to determine whether the suspect can explain the suspicious circumstances so that an unnecessary arrest will be avoided. If the officer cannot ensure his own safety while he is questioning the suspect, however, he will not hesitate to make the arrest.

Finally, if a suspect is allowed to leave after a stop, he will of course return to his car. If a weapon is concealed in the car there is some danger that he will use it on the officers. See *United States* v. *Romero*, *supra*, slip op 7; *United States* v. *McClinnhan*, *supra*, 660 F.2d at 504; *United States* v. *Green*, *supra*, 465 F.2d at 625. While a

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[4] It is, of course, wholly unrealistic to expect officers, reacting quickly to a hazardous situation, to give a suspect a choice among security measures; in view of the difficulty the deputies had in even obtaining respondent's driver's license and registration, for example, it cannot be suggested that they should have pursued that course here.

suspect who has been stopped and released may ordinarily have less reason to attack the officers than an arrestee, he will not *always* have less incentive to do so,[5] and he will always have more opportunity to obtain a weapon. Consequently, if the officers reasonably suspect that there might be a weapon in a car and that the suspect may be dangerous, it is reasonable for them to insist on inspecting the car before they allow the suspect to reenter it—no matter how able they may have been able to control him while the stop lasted.

An investigatory stop, of course, must culminate either in the suspect's arrest or in his release. If the suspect is arrested, *Belton* permits a full search of the car; if he is to be released, and the police reasonably believe there might be a weapon in the car, they have, for the reasons stated, ample grounds to conduct a limited weapons search of the car. It is, therefore, pointless to deny the officers the authority to inspect the car for weapons as soon as they have reasonable suspicion that the suspect may be armed and dangerous.

II. THE FOURTH AMENDMENT PERMITS AN INVENTORY SEARCH OF THE UNLOCKED TRUNK OF A CAR ABOUT TO BE TOWED

1. After respondent was arrested, Deputy Howell opened the trunk of his car. The trunk had no lock and apparently could be opened by reaching into an opening from which the lock had been "punched out." See Pet. App. 15-16. Deputy Howell found 75 pounds of marijuana in the trunk.

Although the search of the trunk seems to us clearly lawful as incident to respondent's arrest (see page 25

[5] "[T]he suspect * * * may have a motive to kill the officer even after returning to his car * * * [if he] has engaged in criminal activity which he believes will be later discovered. Since the police officer * * * has learned the suspect's identity, he will often be able to connect the suspect to the later-discovered crime * * *." *United States* v. *Rainone*, *supra*, 586 F.2d at 1134-1135 & n.3.

note 7, *infra*), the State now defends the opening of the trunk solely on the ground that it was undertaken in order to inventory the contents before impounding the car. See Pet. iii; *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). When he opened the trunk, Deputy Howell had already determined that respondent's car would have to be towed, because it was partially blocking the road and respondent was under arrest. Deputy Howell testified that he opened the trunk at least in part because he wanted to take an inventory of any valuables before the car was impounded.

The Michigan Supreme Court did not consider the inventory search rationale, however, because it concluded that the trunk could not have been searched in any event if marijuana had not been discovered in the front seat by a search it considered unlawful.[6] Should the Court agree with us that the limited weapons search of the front seat was authorized by *Terry*, the Court could reasonably choose to permit the Michigan Supreme Court to consider, in the first instance, the possible justifications for the search of the trunk.[7]

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[6] This conclusion is not obviously correct. Respondent's behavior suggested that he may have been unfit to drive the car, and it is unclear from the record whether the car became disabled when it was driven off the road. It is therefore possible that the car would have been towed even if respondent had not been arrested for possession of marijuana.

[7] We note in this connection that even if the opening of the trunk was not justified under *Opperman* as an inventory search, it was surely lawful as a search incident to arrest under *Belton*. *Belton* explicitly dealt only with the passenger compartment of a car, and its application to a locked trunk is unclear. But an unlocked trunk that could, apparently, be opened with only slightly more difficulty than a car door is as accessible to an arrestee as the passenger compartment of a car. Since at the time of respondent's arrest he was not far from the trunk, the rationale of *Belton* extends to Deputy Howell's search of the trunk.

We also note that the discovery of marijuana in the front seat may well have given the deputies probable cause to search the car as a whole (see *Robbins* v. *California*, 453 U.S. 420, 451 & n.13 (1981) (Stevens, J., dissenting)), in which event a warrantless search of the trunk (see *United States* v. *Ross*, *supra*; *Chambers*

2. In the event the Court addresses the question whether the search of the trunk was a valid inventory search, however, we offer the following observations. That search differed from the search upheld in *Opperman* in three arguably material respects. First, while Deputy Howell stated that he had a personal practice of taking an inventory of vehicles that were to be towed, we do not understand the State to claim that he was following a generally applicable policy of the police department. Second, respondent's car was inventoried on the scene, not in the police lot. Third, the officers conducting the inventory in *Opperman* examined the inside of a locked passenger compartment, including an unlocked glove compartment; Deputy Howell examined an unlocked trunk. Compare 428 U.S. at 365-366 with Pet. App. 16.

We recognize that the first of these distinctions is significant, and renders the inventory justification for Deputy Howell's search of the trunk weaker than the justification offered in *Opperman*. See *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 383-384 (Powell, J., concurring). But see *United States* v. *Prescott*, 599 F.2d 103 (5th Cir. 1979). We submit, however, that the other two differences do not undermine the inventory rationale.

The inventory search is a "response to three distinct needs: the protection of the owner's property while it remains in police custody * * *; the protection of the police against claims or disputes over lost or stolen property * * *; and the protection of the police from potential danger." *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 369. By conducting an inventory on the scene, and an inventory of an unlocked trunk, a police officer substantially furthers these interests. An inventory taken on the scene, as soon as the officers have determined that a car will be towed, reduces the time during which valuables are not secured and dangerous objects not removed. More-

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v. *Maroney*, *supra*), would be permissible. See also *United States* v. *Haley*, 669 F.2d 201, 203-204 (4th Cir.), cert. denied, No. 81-1815 (June 14, 1982).

over, the fewer hands a vehicle passes through before it is inventoried, the less the possibility of claims of theft against the police—and of actual theft. See *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 378-379 (Powell, J., concurring). This may be a particularly important concern when the police use a private towing contractor.

At the same time, we can discern no reason to consider an inventory on the scene to be any more intrusive then a later inventory of an impounded vehicle. Indeed, the owner is more likely to be on the scene, and he may—by taking possession of objects found in the vehicle, for example—be able to limit the intrusiveness of the search.

An unlocked trunk is plainly more vulnerable to theft than a locked passenger compartment; it is arguably more vulnerable even than an unlocked passenger compartment, because a thief can obtain its contents more quickly. An inventory of an unlocked trunk is therefore at least as necessary as the search upheld in *Opperman* if the police are to protect the interests that justify an inventory search. Indeed, several courts of appeals have upheld inventory searches of *locked* trunks. See, *e.g.*, *United States* v. *Edwards*, 577 F.2d 883, 893-894 & n.23 (5th Cir.) (en banc), cert. denied, 439 U.S. 968 (1978); *United States* v. *Smith*, 621 F.2d 483, 488 (2d Cir. 1980), cert. denied, 449 U.S. 1086 (1981); *United States* v. *Martin*, 566 F.2d 1143 (10th Cir. 1977). See also *State* v. *Prober*, 297 N.W.2d 1, 6-7 (Wis. 1980). Compare *United States* v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980), with *United States* v. *Maier*, No. 82-1218 (8th Cir. Oct. 27, 1982). In addition, it seems clear that because an unlocked trunk is so accessible to strangers, an owner's expectation of privacy in its contents is significantly less than his expectation of privacy in a glove compartment inside a locked car. For these reasons, we submit that both the fact that it occurred on the scene and especially the fact that it involved an unlocked trunk strengthen the inventory rationale and support the lawfulness of the second search.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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